

<sup>3</sup> See IPR Opposition at 9.

York City media market, it would disserve the public interest to require Fox to divest one of its outlets before the Commission completes its reconsideration of the decades-old NBCO rule.

**I. THE COMMISSION HAS LONG RECOGNIZED THE NBCO RULE’S OBSOLESCENCE AND THE PUBLIC BENEFITS OF CROSS-OWNERSHIP OF THE STATIONS AND THE POST.**

The Commission in 2003 concluded that the NBCO rule should be eliminated because, even at that time, it was “not a reasonable means to accomplish the public interest purposes to which [it is] directed,” including competition, diversity, and localism.<sup>4</sup> A year later, the Third Circuit held that “reasoned analysis supports the Commission’s determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest.”<sup>5</sup> Yet, as the Third Circuit noted 12 years later, as a result of litigation and Commission delays “the 1975 ban remains in effect to this day even though the FCC determined more than a decade ago that it is no longer in the public interest.”<sup>6</sup> The rule is now under reconsideration precisely because the conclusions reached more than a decade ago are even more applicable to the media marketplace of 2017 — the intensity of media competition from ever-more sources and technologies confirms that common ownership of a newspaper and broadcast outlets cannot pose any harm to the public interest.

When the Commission consented to Fox’s acquisition of WWOR-TV in July 2001, it required Fox to come into compliance with the NBCO rule within two years only “insofar as it is

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<sup>4</sup> *In re 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13621-13627 (2003) (“2003 Order”) (rev’d and remanded, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (“*Prometheus*”).

<sup>5</sup> *Prometheus*, 373 F.3d at 398.

<sup>6</sup> *Prometheus Radio Project v. FCC*, 824 F.3d 33, 51 (3d Cir. 2016) (*Prometheus III*).

necessary under our rules at that time.”<sup>7</sup> The Commission also made clear that “[i]f our rules should change during that period to permit the proposed combination,” then no divestitures would be necessary.<sup>8</sup> The NBCO rule did indeed change during the intervening 24 months — the Commission voted to repeal the rule in June 2003.<sup>9</sup> Fox sought a temporary extension of its waiver to the extent necessary to permit the repeal of the NBCO rule to go into effect, and that request was still pending when the Third Circuit issued a blanket stay of all of the *2003 Order*’s various changes to the Commission’s ownership rules, including elimination of the NBCO Rule. As Fox has previously explained,<sup>10</sup> the Third Circuit’s stay left Fox’s NBCO waiver in place as well; the Third Circuit also left that stay — and with it, Fox’s NBCO waiver — in place when the court ultimately remanded the ownership rule changes to the Commission.<sup>11</sup>

For the 13 years since the Third Circuit endorsed the Commission’s decision to eliminate the NBCO rule, the Stations and the *Post* have operated in good standing while awaiting a final resolution of how the Commission would account for changes in the media marketplace since the rule’s adoption in 1975.<sup>12</sup> During that time, the Commission on multiple occasions has recognized the benefits of the cross-ownership of the Stations and the *Post* — for example, providing a temporary waiver in 2006 that recognized the unique New York media market is

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<sup>7</sup> *In re Applications of UTV of San Francisco, Inc., et al (Assignors) and Fox Television Stations, Inc. (Assignee)*, 16 FCC Rcd 14975, ¶ 50 (2001) (“*First Waiver Order*”).

<sup>8</sup> *Id.* at ¶ 45 n. 73.

<sup>9</sup> *See 2003 Order*, 18 FCC Rcd at 13621-13627.

<sup>10</sup> *See, e.g.*, Consolidated Opposition of Fox Television Stations, Inc. to Petitions to Deny, File Nos. BRC DT-20150202ACT and BRC DT-20150202ACP, at 5-6 (filed June 1, 2015) (“*Fox 2015 Opp.*”).

<sup>11</sup> *See Prometheus*, 373 F.3d at 435.

<sup>12</sup> *See, e.g.*, Letter from Jared S. Sher, Vice President, 21st Century Fox, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-260 (filed May 16, 2014); Letter from Antoinette Cook Bush and Jared S. Sher, Counsel, Fox, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-260, (filed November 13, 2009).

“more than sufficiently competitive to withstand the harms the [NBCO] rule was designed to prevent,”<sup>13</sup> and, in 2014, acknowledging that the cross-ownership of these media outlets is

“admittedly unique,” in part because it is located in “the number one media market.”<sup>14</sup>

Notwithstanding the Commission’s missed opportunity last year to complete the task assigned to it by the Third Circuit in 2004, the Commission throughout this time has recognized the important role that the Stations and the *Post* under current ownership play in the New York media market.

## **II. THE COMMISSION SHOULD COMPLETE ITS RECONSIDERATION OF THE NBCO RULE BEFORE APPLYING THAT RULE TO THE STATIONS AND THE POST.**

In its August 2016 order concluding the *2014 Quadrennial Review*, a three-member majority deviated from the Commission’s longstanding recognition of the need to revisit the NBCO rule, choosing instead to retain the NBCO rule effectively unchanged from its 1975 form except for minor technical updates and the adoption of a narrow exception for failed or failing outlets.<sup>15</sup> In dissent, Commissioner (now Chairman) Pai and Commissioner O’Rielly — who now form the Commission’s majority — left no doubt that they would have completed the task the Commission began in 2003 by eliminating the NBCO rule, recognizing the changed

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<sup>13</sup> *Applications for Transfer of Control of Fox Television Stations, Inc. from K. Rupert Murdoch to Fox Entertainment Group*, Mem. Op. & Order, 21 FCC Rcd 11499, 11502 (2006) (“*2006 Decision*”). Fox’s 2004 petition for a permanent waiver remains pending. See *Application for Renewal of License of WWOR-TV, Secaucus, New Jersey*, Mem. Op. & Order, 29 FCC Rcd 9564, 9579 (MB 2014) (“*2014 Bureau Grant*”), *apps for review pending*.

<sup>14</sup> *Id.*

<sup>15</sup> See *2014 Quadrennial Regulatory Review*, Second Report and Order, 31 FCC Rcd 9864, 9913-14 (2016) (“*Quadrennial Review Order*”).

circumstances in the media marketplace since the rule's adoption.<sup>16</sup> The National Association of Broadcasters ("NAB") promptly sought reconsideration of the Commission's decision,<sup>17</sup> and that petition is pending. The Media Bureau accordingly should preserve the *status quo* by granting Fox a new temporary waiver, which would remain in place until 90 days following resolution of NAB's petition for reconsideration.

*A. A Temporary Waiver is Consistent with the Commission's Precedent and Justified by the Circumstances.*

Contrary to the IPR Opposition's contention, the temporary waiver Fox requests would be neither improper nor novel.<sup>18</sup> Indeed, the Commission granted similar temporary relief to parties with pending NBCO waivers at the time of the *2006 Quadrennial Review Order* (referred to by the Commission as the "Media Parties"), and the Bureau in 2012 decided to maintain that relief in place because the Commission by that point was "considering revisions to the newspaper/broadcast cross-ownership rule that, if adopted, would change the applicable

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<sup>16</sup> *Id.*, Dissenting Statement of Commissioner Ajit Pai (criticizing the for "doubling down" on the NBCO rule) and Dissenting Statement of Commissioner Mike O'Rielly (arguing that the NBCO rule "create[s] artificial silos that are preventing broadcasters and newspapers from competing with new entrants and serving the needs of consumers.").

<sup>17</sup> Petition for Reconsideration of the National Association of Broadcasters, MB Docket No. 14-50 *et al.* (filed Dec. 1, 2016) ("NAB Recon Petition").

<sup>18</sup> See IPR Opposition at 7. The IPR Opposition also reiterates claims IPR and parties it represents have made in prior pleadings in these proceedings. See IPR Opposition at 2-3, 5-6. Fox has refuted these claims. See Consolidated Opposition of Fox Television Stations, Inc. to Petitions to Deny, File Nos. BRCDT-20150202ACT and BRCDT-20150202ACP (filed June 1, 2015) ("Fox 2015 Opp."); Consolidated Opposition of Fox Television Stations, Inc. to Applications for Review, MB Docket No. 07-260 (filed Oct. 23, 2014) ("Fox 2014 Opp."). For instance, the IPR Opposition repeats Voice for New Jersey's erroneous assertion that "Fox admitted making misrepresentations regarding WWOR's service to New Jersey in exhibits filed with the Commission." IPR Opposition at 6. This is false. As Fox has explained, the Media Bureau rejected VNJ's allegations that Fox misrepresented WWOR's level of service in *ex parte* filings made in 2009. The Bureau considered all the evidence on this point and determined that the record evidence established that "any confusion created by Fox's filing was unintentional and was harmless error." *2014 Bureau Grant*, 29 FCC Rcd at 9576.

standards for evaluation of the requests for waiver of the rule.”<sup>19</sup> The Media Parties explained that “requiring them to file before the revised newspaper/broadcast cross-ownership rule is adopted would be a ‘substantial waste of both private and administrative resources.’”<sup>20</sup> The Bureau agreed, concluding that an “extension of time will ensure that Media Parties’ supplemental filings can address the issues relevant to the newspaper/broadcast cross-ownership rule that is adopted in that pending proceeding,” which would provide the Commission with “a more robust and comprehensive record upon which to evaluate Media Parties’ waiver showings.”<sup>21</sup> The Bureau thus extended the Media Parties’ deadline “until 60 days after the release of an order in the ongoing media ownership quadrennial review that adopts a final newspaper/broadcast cross-ownership rule.”<sup>22</sup> This precedent refutes the IPR Opposition’s assertion that granting the waiver Fox has requested “would violate long-standing Commission policy.”<sup>23</sup>

The decisions cited by the IPR Opposition in which the Commission denied a contingent temporary waiver stand for no more than the proposition that a pending rulemaking proceeding, *standing on its own*, does not in all cases justify such a waiver. Whatever the merits of that assertion, it is irrelevant to Fox’s instant request. Fox’s current waiver request is not based “simply on the grounds that the rule [is] the subject of an ongoing rulemaking”<sup>24</sup> or on “the mere

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<sup>19</sup> 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Order, 27 FCC Rcd 11113, 11114 (MB 2012).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> IPR Opposition at 7.

<sup>24</sup> *Id.* at 7 (quoting 1998 Biennial Review NOI, 13 FCC Rcd 11276 at ¶ 55 (1998)).

initiation of a proceeding stating that the rule would be examined.”<sup>25</sup> Rather, the Commission has the NBCO rule under reconsideration at a time when a majority of the current Commission is on record supporting repeal of the rule. Even if the Commission decides to retain the rule in some form, it may well adopt different, more specific standards for NBCO waivers.<sup>26</sup> Given that the ownership structure at issue here has been in existence for over 15 years, there is no plausible argument that the public interest would be harmed by maintaining the *status quo* on a temporary basis until the Commission rules on NAB’s petition for reconsideration.<sup>27</sup> Under these circumstances, requiring Fox to litigate its permanent waiver request before the Commission completes its pending reconsideration of the NBCO rule would indeed be a substantial waste of both private and administrative resources.

*B. The Requested Waiver Would Not Harm Viewpoint Diversity in New York.*

Even if the *Quadrennial Review Order*’s NBCO waiver standard did apply, the record is clear that allowing Fox to maintain its existing properties cannot plausibly be deemed to harm viewpoint diversity in New York. The Commission has repeatedly recognized that the New York media market is characterized by an “extreme diversity of voices,”<sup>28</sup> and that the market is

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<sup>25</sup> *Id.* at 8 (quoting *First Waiver Order*, 16 FCC Rcd 14975 at ¶ 41).

<sup>26</sup> See *Quadrennial Review Order*, Dissenting Statement of Commissioner Ajit Pai, 31 FCC Rcd at 10051 (“[T]he waiver standard adopted by the Commission today is far vaguer and more subjective than the 2007 standard for it lacks *any* objective criteria. ‘Knowing it when we see it’ is hardly the stuff of administrative precision.”).

<sup>27</sup> The precedent cited in the IPR Opposition addresses instances in which a pending proceeding is cited to justify a new combination or, in one case, assignment of a combination to a new buyer. Fox, however, merely seeks maintenance of the *status quo* ownership structure to provide the Commission with time to act on the pending petition for reconsideration. See, e.g., Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau to Stephen Hartzell, Brooks Pierce *et al.* and Robert Primosch, Wilkinson Barker Knauer, LLP, *In re: WFLS-FM et al.*, at 7 (Nov. 26, 2014) (declining to grant permanent NBCO waiver for proposed assignment of grandfathered combination in the Fredericksburg, VA market and observing that “in the landmark NBCO waiver cases *Field* and *Fox*, both assignees were reacquiring the media properties at issue . . . This is not the case here, where the proposed transaction would result in completely new ownership of the relevant media properties.”).

<sup>28</sup> *Murdoch Recon*, 24 FCC Rcd at 5829.

“more than sufficiently competitive to withstand the harms the [NBCO] rule was designed to prevent.”<sup>29</sup> Nor is there any basis for any party to assert that the New York media market does not remain uniquely competitive. Then-Commissioner Pai noted just last year that the market includes “five major newspapers, over twenty television stations, and about 60 radio stations in the market contributing to viewpoint diversity.”<sup>30</sup> This does not include the wide variety of cable, online, and other non-traditional outlets ignored by the Commission’s current analysis of viewpoint diversity. Thus, the information already in the record about the New York media market, including in Fox’s prior filings, demonstrates that a permanent waiver allowing Fox to retain its interests in the Stations and the *Post* could not be found to “unduly harm viewpoint diversity” in New York.<sup>31</sup>

## CONCLUSION

Grant of Fox’s requested relief will allow the newly reconstituted Commission time to consider the status of the NBCO rule as part of the pending *2014 Quadrennial Review* reconsideration proceeding without disrupting the highly competitive New York media marketplace or impairing the viability of diverse sources of information in that market. Accordingly, for the reasons set forth herein and in Fox’s request, the Commission should deny the IPR Opposition and grant Fox a temporary waiver of the NBCO rule until 90 days following resolution of the pending petition for reconsideration of the *Quadrennial Review Order*.

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<sup>29</sup> *2006 Decision*, 21 FCC Rcd at 11502.

<sup>30</sup> See *Quadrennial Review Order*, Dissenting Statement of Commissioner Ajit Pai, 31 FCC Rcd at 10049.

<sup>31</sup> IPR asserts that “[i]f Fox’s prior showings were sufficient for a permanent waiver, the Commission would long ago have granted Fox a permanent waiver.” IPR Opposition at 7. This allegation ignores the fact that the Commission found that the NBCO rule itself lacked merit in 2003, the Court upheld that finding in 2004, and the Commission for many years has refuted claims by IPR and entities it represents regarding the cross-ownership of the Stations and the *Post*.



**FOX TELEVISION STATIONS, LLC**

Joseph M. Di Scipio  
Senior Vice President, Legal and FCC  
Compliance  
Fox Television Stations, LLC  
400 N. Capitol Street, N.W., Suite 890  
Washington, D.C. 20001  
(202) 824-6500

COVINGTON & BURLING LLP  
One CityCenter  
850 Tenth Street N.W.  
Washington, DC 20001  
(202) 662-6000

*Its Attorneys*

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## CERTIFICATE OF SERVICE

I, Michael Beder, an associate at Covington & Burling LLP, hereby certify that on this 25th day of April, 2017, I caused a copy of this Reply to Opposition to be served by U.S. First Class mail, postage prepaid, upon the following:

Matthew Wood  
Free Press  
1025 Connecticut Avenue NW  
Suite 1110  
Washington, DC 20036  
(202) 265-1490  
*Counsel for Free Press*

Angela J. Campbell  
Andrew Jay Schwartzman  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Avenue, NW  
Suite 312  
Washington, DC 20001  
(202) 662-9535  
*Counsel for Office of Communication, Inc. of  
the United Church of Christ and the  
Rainbow/PUSH Coalition*  
  
*Counsel for Voice for New Jersey*

/s/  
\_\_\_\_\_  
Michael Beder